84-1938

No.

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ALEXANDER L. STEVAS,

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

GABRIEL ENERGY CORPORATION, - - Petitioner

versus

DONALD P. HODEL, Secretary of the Interior,
JED CHRISTENSEN, Acting Director, Office of Surface Mining Reclamation and Enforcement,
W. HORD TIPTON, Lexington Field Office Director, Office of Surface Mining, Reclamation and Enforcement, - - - - - Respondents

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether a privately owned mineral estate in a tract in which the United States owns the surface estate is "Federal lands" as that term is used in 30 U.S.C. 1272 (e)(2) and defined at 30 U.S.C. 1291(4) and whether the provisions of 30 U.S.C. 1272(e)(2) pertaining to "Federal lands" can be applied to such a privately owned mineral estate.

II. Whether a tract referred to in Question I above but which is totally outside of a national forest boundary established by presidential proclamation is "within the boundaries of any national forest" as that phrase is used in 30 U.S.C. 1272(e)(2).*

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*The appellant in the Sixth Circuit was Gabriel Energy Corporation, the petitioner here, which has no parent companies, subsidiaries or affiliates.

The appellees in the Sixth Circuit were James G. Watt, Secretary of the Interior, the United States Department of the Interior; Andrew Bailey, Acting Director, Office of Surface Mining Reclamation and Enforcement (OSM), United States Department of the Interior; and David C. Short, Director, Region II, OSM, United States Department of the Interior. Because Secretary Hodel is the successor to Secretary Watt, Jed Christensen is the successor to Acting Director Bailey, and W. Hord Tipton, Lexington Field Office Director, OSM, is the successor to Mr. Short, we have substituted Secretary Hodel, Jed Christensen, and W. Hord Tipton as the federal parties in this case, pursuant to Rule 40.3 of the Rules of this Court.

In the Sixth Circuit, the appeal of Gabriel Energy Corporation was consolidated with two other appeals. In one, Paul Reeves, Acting Director, OSM, United States Department of the Interior, who has been succeeded in office by Jed Christensen, was an appellee and The Stearns Company and Ramex were appellants.

In the other consolidated appeal, the appellants were Walter J. Fitzmartin, Jane A. Fitzmartin, Herman Israel, and Yvonne O'Brien, Ex'x of the Estates of John F. R. Clark and Madeline Clark. That appeal was dismissed for failure to file a brief.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No.

GABRIEL ENERGY CORPORATION, - - *Petitioner*

v.

DONALD P. HODEL, Secretary of the Interior, Et Al., - - - - - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Gabriel Energy Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals was filed on January 29, 1985 (App. A, *infra,* 1a-7a) and is reported at 753 F. 2d 521. The March 15, 1985 order of the Court of Appeals denying the Petition for Reconsideration (App. B, *infra,* 8a) is unreported.

The November 3, 1981 Memorandum Opinion of the United States District Court for the Eastern District of Kentucky (App. D, *infra,* 11a-20a) is unreported. The April 1, 1983 Memorandum Opinion of the District Court denying Petitioner's Motion for Reconsideration (App. E, *infra,* 21a-29a) is unreported.

The January 23, 1981 letter of David C. Short, Director, Region II, Office of Surface Mining and Reclamation and Enforcement, to Gabriel Energy Corporation (App. F, *infra,* 30a-31a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was filed on January 29, 1985 (App. C, *infra,* 9a-10a), and a timely petition for rehearing was denied on March 15, 1985 (App. B, *infra,* 8a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause, U. S. Const., Art. I, Section 8, cl. 3 provides:

> The Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

2. The Property Clause, U. S. Const., Art. IV, Section 3, cl. 2 provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

3. The Due Process Clause, U. S. Const., Amend. V, cl. 4, provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

4. 16 U.S.C. 471 (repealed) provides:

> The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, and any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof. . . .

5. 16 U.S.C. 473 provides:

> The President of the United States is authorized and empowered to revoke, modify, or suspend any and all Executive orders and proclamations or any part thereof issued under Section 471 of this title, from time to time, as he shall deem best for the public interests. By such modification, he may reduce the area or change the boundary lines or may vacate altogether any order creating a national forest.

6. 16 U.S.C. 521 provides:

> Subject to the provisions of Section 519 of this Title, the lands acquired under Sections 513-519 and 521 of this Title, shall be permanently reserved, held, and administered as national forest lands under the provisions of Section 471 of this Title and Acts supplemental to and amendatory thereof and the Secretary of Agriculture may from time to time divide the lands acquired under the aforesaid sections into such specific national forests and so designate the same as he may deem best for administrative purposes.

7. 30 U.S.C. 1272(e)(2) provides in pertinent part:

> After August 3, 1977, and subject to valid existing rights, no surface coal mining operations except those which exist on August 3, 1977, shall be permitted—
>
> . . .
>
> (2) on any Federal lands within the boundaries of any national forest: *Provided, however,* THAT surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and—. . .;

8. 30 U.S.C. 1291(4) provides in pertinent part: For the purposes of this Chapter—

> . . .
>
> (4) "Federal lands" means any land, including mineral interests, owned by the United States without regard to how the United States acquired ownership of the land and without regard to the agency having responsibility for management thereof, except Indian lands. . . .

STATEMENT OF THE CASE

This controversy involves the construction and application of one single provision — 30 U.S.C. 1272 (e)(2) — of the Surface Mining Control and Reclamation Act of 1977, P.L. 95-87, 30 U.S.C. 1201-1328 (hereinafter "Act"), where the proposed mining would occur on a tract in which the mineral estate is privately

owned and the surface estate is owned by the United States. The United States acquired its surface estate in the tract under the authority of the Weeks Act,[1] which authorizes acquisitions for national forest purposes, but the tract has not been included within the proclaimed boundary of the nearby Daniel Boone National Forest or of any other national forest.

This action was begun by the petitioner's complaint seeking declaratory and permanent injunctive relief, both of which the petitioner has continued to seek throughout this proceeding.

Beyond that basic statement of the case, however, there are other relevant matters concerning what the case involves and what it does not.

The petitioner, Gabriel Energy Corporation, is a Kentucky corporation with a leasehold interest in the

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[1]The Weeks Act of 1911, also referred to as the Appalachian Forest Act, 36 Stat. 961 as amended, 30 U.S.C. 480, 50, 513-519, 521, 552, 563 (1983 ed.), at 16 U.S.C. 518, allows the United States to acquire the surface estate in land subject to an outstanding mineral interest for the purpose of establishing the national forest where the outstanding mineral interest would "in no manner interfere with the purposes of [the national forest]." The government in acquiring forest property, sought to spread its resources and acquire as much property as it could for the least consideration necessary. In order for the government to induce the land owner to convey an interest in the property for the minimum consideration, the government found it necessary to allow certain rights to be retained. *See U. S.* v. *Nebo Oil Co.*, 90 F. Supp. 73, 99-100 (W.D. La. 1950), *Aff'd.* 190 F. 2d 1003 (5th Cir. 1951); *See also U. S.* v. *Little Lake Misere Land Co., Inc.*, 412 U. S. 580, 598-600 (1973). (Considers similar provisions authoriing government purchase of severed surface estate under Migratory Bird Conservation Act, 45 Stat. 1222, 16 U.S.C. 715, *et seq.*).

mineral estate in a tract of land located in Owsley County, Kentucky.

Gabriel's lessors own the mineral estate in the tract in fee simple. The United States owns the surface estate in the tract in fee simple.

The two estates were severed on January 31, 1957 by deed conveying the surface estate to private parties and reserving the mineral estate to the grantor. Subsequent to that severance, Gabriel's lessors acquired the mineral estate by deed on January 12, 1965. After that, the United States acting under the authorization of the Weeks Act purchased the surface estate in the tract on December 3, 1973 in a transaction involving only the United States and the then owners of the surface estate.

On July 15, 1980, the plaintiff acquired its leasehold in the mineral estate in the tract, and subsequently obtained from the State of Kentucky a permit to operate an underground mine. There is no dispute here that the surface effects of the petitioner's underground mine on the seven acre tract involved would be subject to the extent specified to the Surface Mining Control and Reclamation Act of 1977. The petitioner is not challenging the application of any provision of the Act other than 30 U.S.C. 1272(e)(2).

After the petitioner had obtained his underground mining permit from the State of Kentucky and had begun to prepare the mine site, the Secretary of the Interior, through subordinate officials, (App. F, *infra,*

30a) advised the Petitioner that the Secretary considers the mineral estate and the activity of the petitioner to be subject to the provisions of § 522 of the Act[2] and that the petitioner would not be allowed to conduct its mining operations until it had sought and obtained the Secretary's determination of either "compatibility" or "valid existing rights" pursuant to 30 U.S.C. 1272(e)(2). Faced with that application of the statute, the petitioner then brought this action.

In its opinion, the Court of Appeals says the petitioner brought its action rather than seek permits pursuant to the Act (App. A, *infra,* 4a), but no question of permits is involved in this controversy except consequentially. Petitioner does not dispute the necessity of obtaining a permit from the appropriate agency.

The thing in dispute is the respondents' insistence that the petitioner obtain from the respondents a determination of either "compatibility" or "valid existing rights."[3] Either determination would be something altogether different from and in addition to any permit that might be required.

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[2]30 U.S.C. 1272 is the codification of Section 522 of the Act.

[3]A "valid existing right" is a mere possessory interest created by statute in land owned by the United States. *Best* v. *Humbolt Placer Min. Co.,* 371 U. S. 334 (1963). It is something less than a "vested" interest held in fee for which a patent has been granted. *Stockley* v. *U. S.,* 260 U. S. 532, 544 (1923). The Secretary of the Interior has adhered to the rules of these cases and regarded the "valid existing right" as a statutory interest inferior to a legal or equitable interest in his administration of the statutes containing those terms. See Opinion by Office of the Solicitor, 88 I.D. 909, 912 (1981).

The petitioner did not choose between alternative forms of relief. The administrative procedure that the respondents would require cannot be considered until the threshold question of whether the conditions and circumstances to which those procedures would apply are present. There is no way for the petitioner or any other party to raise that question except in a proceeding such as this.

It would not matter how a determination under Section 1272(e)(2) of either "valid existing rights" or "compatibility" might be resolved in a particular instance. It begs the question to say the petitioner may pursue a determination before it has been determined that the petitioner is a member of a class that has been or can be subjected to that determination.

For that reason, it is necessary in order to analyze and understand the initial application of 30 U.S.C. 1272(e)(2) to examine the existing law governing the extent of ownership of the mineral estate and the corresponding rights and limits of the ownership of a surface estate in a severed tract of land.

The petitioner does not challenge the generally applicable permitting and performance requirements of the Act as was done in *Hodel* v. *Indiana,* 452 U. S. 314 (1981), and *Hodel* v. *Virginia Surface Min. & Reclam. Ass'n.,* 452 U. S. 264 (1981). The petitioner seeks only to be treated under the Act in accordance with the true nature of the property interests involved.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

Question I

Whether a Privately Owned Mineral Estate in a Tract in Which the United States Owns the Surface Estate Is "Federal Lands" as That Term Is Used in 30 U.S.C. 1272(e)(2) and Defined at 30 U.S.C. 1291(4) and Whether the Provisions of 30 U.S.C. 1272(e)(2) Pertaining to "Federal Lands" Can be Applied to Such a Privately Owned Mineral Estate.

A. The Definition and Nature of Property and the Estates in Land

This case involves a question of first impression of the definition and application of the term "Federal lands" as it is used in the Act. 30 U.S.C. 1272(e)(2).[4] A petition of certiorari should be granted because the decision of the Court of Appeals confuses and combines the sovereign and proprietary capacities of the United States. In reaching that decision not just the treat-

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[4]This question has not been considered by the Court. Neither *Hodel* v. *Indiana*, 452 U. S. 314 (1981), nor *Hodel* v. *Virginia Surface Min. & Reclam. Ass'n.*, 452 U. S. 264 (1981), consider the question presented here. *Hodel* v. *Indiana* considers only certain specific provisions of the Act not invloved here. Though *Hodel* v. *Virginia Min. & Reclam. Ass'n.* upholds most of the Act's provisions as a valid exercise under the Commerce Clause, the section involved here is expressly excluded from the Court's consideration and holding because of a lack of justiciable controversy on that issue where no party to that action had an interest in any land to which 30 U.S.C. 1272(e)(2) could apply. *Hodel, supra*, at 294. The fundamental question of the application of 30 U.S.C. 1272 (e)(2) is still a question of first impression and it is now factually before the Court.

ment of the property involved here, but the basic and ultimate concept of property enunciated in *U. S.* v. *General Motors Corp.*, 323 U. S. 373 (1945), and other decisions, is totally altered. That alteration in the meaning of property would impinge most immediately upon the owners of land in which the mineral and surface estates have been severed, but it would also alter the meaning of property in every situation whether minerals were involved or not, and that alteration would occur regardless of the ownership of any particular interest.

Though the whole controversy here involves only one statutory section which applies only to "Federal lands", 30 U.S.C. 1272(e)(2), which is defined as "land, including mineral interests, owned by the United States", 30 U.S.C. 1291(4), the Court of Appeals in its opinion does not consider the only controlling question raised by these statutes which is the meaning of "lands" and "ownership" and "property". The Court of Appeals appears to treat the matter as a question only of sovereign power; and without identifying or discussing it, finds that the United States sufficiently possesses it in this instance.

But that view is inapplicable and alters the property involved. That is because even though the specific rules of mineral law vary through the various jurisdictions, the basic relationship between the mineral and surface owners has been essentially the same in every state and federal jurisdiction. That basic essential relationship between the mineral owner and the surface owner is that the mineral owner may use the tract for the min-

ing of whatever mineral is involved, and the surface owner may use the tract for all other purposes not interfering with the production of the mineral. When those two uses come into conflict, the surface owner's conflicting use must yield to the mineral owner's production of the mineral — but only to that and nothing else.

That is the "servient" relationship of the surface estate to the mineral estate and that is all that it is. *Kinney-Coastal Oil Co.* v. *Kieffer,* 277 U. S. 488, 504 (1928). If that were not so and the mineral owner were required, as the Court of Appeals decision would require, to yield to the surface owner's use, the mineral owner's only use would always have to yield and a severed mineral estate would be meaningless and could never be used.

It is not a unique relationship. It is the same relationship and the same rationale that exists in the law of easements which allows one with an easement to use a tract in a certain way even when the owner of the underlying estate in fee might otherwise make some other conflicting use of it. *See Elam* v. *Elam,* 322 S. W. 2d 703, 706 (Ky. 1959), for discussion of that relationship. An easement which could be used only when it did not interfere would be a sufferance and not an easement. The Court of Appeals decision would do the same thing to the relationship between severed surface and mineral estates.

No court has ever before gone that far. If such a rule had been followed in *Kinney-Coastal Oil Co.* v.

Kieffer, supra, the surface owner by his decision to build a town would have curtailed and perhaps precluded the production of oil and gas from the mineral estate owned by the United States. But the court did not reach that result. The court held that the *right* of the surface owner to use the tract for any purpose is limited and defined by the rights incident to the mineral estate. Those rights are inherent in the estate itself and are not something to be applied or withheld in individual cases. In *Kinney-Coastal Oil Co.* v. *Kieffer, supra* at 505, the court explained "by this suit, the plaintiffs [lessees of the mineral owner the United States] are not seeking to acquire a right to use the surface but to protect it from wrongful obstruction and impairment, the right which they already have."

It is that relationship which the decision of the Court of Appeals would alter; and wherever followed, it would alter the relationship not by announcing a new substantive rule of mineral law, but by altering the concept and meaning of property itself. All property would be affected by the consequences flowing from the change in its very nature and definition.

"Property" as a concept in the law has included every kind of right and power which may be owned and all of the constituent elements of each of them. *Nashville C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249, 268 (1933); *Bromley* v. *McCaugn,* 280 U. S. 124, 137 (1929). The term "property" is thus *nomen generalissimum. See Hoyd* v. *Citizens Bank of Albany Co.,* 89 F. 105, 107 (6th Cir. 1937); *Lucas* v. *Schneider,* 47 F. 2d 1006, 1008 (6th Cir. 1931). Property is every valuable right,

power and interest including the right of possession, *U. S.* v. *General Motors Corp.*, 323 U. S. 373, 378 (1945), the right of use, *Superior Bath House* v. *McCarroll*, 312 U. S. 176, 180-181 (1941), and the right of disposal, *Nashville C. & St. L. Ry.* v. *Wallace, supra.*

Each of those rights or attributes is a "stick" in the bundle of sticks which the courts have used by way of metephor or analogy to describe property. *See Superior Bath House* v. *McCarroll, supra;* and *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582 (1937). As the courts have used that metaphor, each attribute or "stick" is itself "property" which then by analogy comprise, in toto, "the bundle of sticks".

What "property" is not, or at least has not been, is the physical object itself. It does not matter whether the physical object is a book, an automobile, or the earth itself, the physical object is not itself "property". To refer to a physical object, even the earth itself, as "property", is merely to use a "shorthand" form for it real nature. *U. S.* v. *General Motors Corp.*, 323 U. S. 373, 377-78 (1945). But when the word "property" is used to mean the physical thing itself, it is, the Court said in *U. S.* v. *General Motors Corp., supra,* "property . . . in its vulgar and untechnical sense". The real nature of property is more accurately, the ". . . rights inhering in the citizen's relation to the physical thing. . . ." *U. S.* v. *General Motors Corp., supra.*

It is on this idea of property in its "vulgar and untechnical sense" that the decision of the Court of Appeals is based. In reaching its decision, the Court

of Appeals alters both the nature of all property of all kinds and in all situations and the nature and relationship between the estates in land.

The Court of Appeals regards and treats the property involved here — the mineral estate and the surface estate — as physical things themselves, as separate and specific layers of earth lying one upon the other. The Court of Appeals misstates the petitioner's theory as ". . . they still own the 'lands' *beneath* the surface . . ." and their "proposal to mine *beneath* federal national forest lands . . ." [emphasis added]. (App. A, *infra,* 5a).

That is not the theory nor the proposal of the petitioner. The petitioner proposes to conduct mining operations on a tract in which it owns the mineral estate and in which the United States owns the surface estate. What the petitioner owns, *i.e.,* the mineral estate, is the right to use the tract, the whole tract and every part and every layer of it, to extract coal from it. What the United States owns, *i.e.,* the surface estate, is the right to use the tract, the whole tract and every part and every layer of it, for every other purpose which does not interfere with the legitimate extraction of coal. Neither the petitioner nor the United States owns just a layer of coal nor a layer of earth and rock of unspecified thickness on top of the tract.

That is the departure of the Court of Appeals from heretofore universal law. It converts the meaning of property from a specific and sometimes limited right to use the thing, or here the tract, to a specific portion of the thing or tract itself — to "property in the vulgar and untechnical" sense.

At first blush, some confusion might arise from the somewhat homonymous character of the words involved. Though the terms "surface" and "mineral" in other circumstances may have reference to physical things or features, those terms are in the context of real property "colloquial shorthand" for "surface estate" and "mineral estate" respectively. *See Shell Oil Co.* v. *Moore,* 382 Ill. 556, 48 N. E. 2d 400, 404 (1943).

It is upon the meaning and nature of the terms "mineral estate" and "surface estate" in the context of property law that the theory and proposal of the petitioner is based. Whatever that analysis and conception of property might be, it will inescapably predestine the outcome of every other question that might arise here.

The only thing to which the statute in question here, 30 U.S.C. 1272(e)(2), applies is "land . . . owned by the United States". 30 U.S.C. 1291(4). And the operative feature of the statute is the ownership or proprietary interest of the United States. Until the nature and extent of that ownership or proprietary interest of the United States is fully examined and specifically delineated, it cannot be determined whether or not there is anything involved to which the statute by its terms might apply.

In order to make that determination of whether or not the operative interest to which the statute would apply is present, there must be a proper analysis and determination of the property interests involved. Those interests and the relationship between them must

be recognized and accorded their ordinary roles in property law, or property itself must be redefined.

That redefinition is demonstrated when one considers fully, as the Court of Appeals did not, what the meaning of property and the relationships between the various interests in property has been.

When property in the form of land is severed into separate estates, each distinct estate is itself land, *British-American Oil Producing Co.* v. *Bd. of Equalization,* 299 U. S. 159, 165 (1936), and the owner of the two estates are both "landowners" equally and to the same extent. *Gabbard* v. *Sheffield,* 179 Ky. 442, 200 S. W. 940 (1918).

The mineral estate is the right to mine whatever mineral is involved. It is not merely the ownership of the mineral as it lies in place, but it is the right to go onto the tract to search for and extract minerals. *Kinney-Coastal Oil Co.* v. *Kieffer,* 277 U. S. 488 (1928); *Sammons* v. *Warfield Natural Gas Co.,* 304 Ky. 548, 201 S. W. 2d 719 (1947); *Trimble* v. *Kentucky River Coal Corp.,* 235 Ky. 301, 31 S. W. 2d 367 (1930), and to all things reasonable and necessary to that end so long as that power is not used arbitrarily, oppressively or maliciously. *Jenkins* v. *DePoyster,* 299 Ky. 500, 186 S. W. 2d 14 (1945). *United Carbon Co.* v. *Webb,* 282 Ky. 79, 137 S. W. 2d 733 (1940). That right is always implied in a grant or reservation of minerals. *Central Kentucky Gas Co.* v. *Smallwood,* 252 S. W. 2d 866, 869 (1953).

The surface estate, by definition, is the correlative right to use and deal with the tract in any other way so long as it does not interfere with the legitimate exercise of those rights of the mineral estate. *British-American Oil Prod. Co.* v. *Bd. of Equalization, supra* at 165; *Kinney-Coastal Oil Co.* v. *Kieffer, supra* at 503; *Jenkins* v *DePoyster, supra* at 15.

Because of the nature of the estates in land and the relationship between them, the exercise of the rights of the mineral estate cannot be said to go on or impose on or harm the surface estate in any way. The mineral owner is not liable to the surface owner for the effects of any legitimate mining activity for, in such a situation, there is not "injury". *Transwestern Pipeline Co.* v. *Kerr-McGee Corp.,* 492 F. 2d 878 (10th Cir. 1974). *Sentry Royalty Co.* v. *Kimmel,* 461 S. W. 2d 76 (Ky. 1970); *United Carbon Co.* v. *Webb,* 282 Ky. 79, 137 S. W. 2d 733 (1940); *Case* v. *Elk Horn Coal Corp.,* 210 Ky. 700, 276 S. W. 573 (1925); *See also, Kinney-Coastal Oil Co.* v. *Kieffer,* 277 U. S. 488 (1928).

Under any body of law by which the question might be examined, it is clear that the right to go onto the tract and take the minerals is not merely a right or license which the mineral owner has at sufferance, but that it is itself a thing owned. It is one of the "sticks" in the bundle of rights. *See Commerce Union Bank* v. *Kinkade,* 540 S. W. 2d 861, 863 (Ky. 1976), *cert. denied,* 340 U. S. 915 (1977).

A mineral estate is "land" and in this particular instance it is land owned by the petitioner Gabriel

Energy Corporation. If "Federal lands" is "land, including mineral interests, owned by the United States", 30 U.S.C. 1291 (4), then the necessary corollary of that statutory definition is that "non-federal land" means "any land, including any mineral interest, *not* owned by the United States." If the privately owned mineral estate involved here is non-federal and not federal land as that term is defined at 30 U.S.C. 1291(4), then there is no nexus to connect that privately owned mineral estate to any provision of 30 U.S.C. 1272(e)(2) which applies only to "federal lands".

Treating the land involved here as "federal land" would require a novel definition of property as specific, isolated, physical portions of the tract or thing owned; or if the definition of property itself were not radically changed, the decision of the Court of Appeals, if allowed to stand, would create a situation in which the definitions and relationships attendant to the estates in land would be of one character where the United States owns the mineral estate or has no interest at all and of an opposite character where the United States owns the surface estate.

If 30 U.S.C. 1272(e)(2) is to be applied to any property other than the government's own property, i.e., "land . . . owned by the United States," that statute will have been extended beyond its own terms and beyond constitutional authority.

B. The Commerce Clause

Like all acts of Congress, the authority for 30 U.S.C. 1272(e)(2) must be found in the Constitution. *Carter*

v. *Carter Coal Co.*, 298 U. S. 238, 291 (1936). But the Constitution provides no authority for that section if it is to be construed as the Court of Appeals has construed it. Neither the Commerce Clause, U. S. Const. Art. I, Section 8, cl. 3, nor the Property Clause, U. S. Const. Art. IV, Section 3, cl. 2, nor any other provision of the Constitution will provide any such authority. On the contrary, the Constitution prohibits such a construction.

Though the power under the Commerce Clause is broad and authorizes the regulation of a great many kinds of activities, 30 U.S.C. 1272 (e)(2) does not regulate anything affecting interstate commerce or protect any interest that might be protected under the Commerce Clause. That section does not purport to regulate anything other than land owned by the United States—the ownership interest of the United States.

There is nothing to even suggest that coal produced from a tract in which the United States owns the surface estate would have an economic impact on interstate commerce distinguishable from the impact of coal produced from other lands or that the mining of coal on such a tract would be any more hazardous to the environment than mining on other lands.

Even though the Act has a general thrust of protecting the environment, Section 1272(e)(2) itself does not; and that will not justify its application to a few but not all producers of coal on private mineral estates. The statute cannot be upheld on that basis. Whatever economic or environmental condition might

be affected by the imposition of Section 1272(e)(2) would be allowed to exist unregulated on other, sometimes identical, sometimes adjacent, land in which the United States has no ownership interest.

It is that unequal treatment of the whole class of coal producers that would cause 30 U.S.C. 1272(e)(2) to fail as an exercise of the commerce power. It is not argued here that Congress may not make distinctions and classifications under the Commerce Clause;

> But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

F.S. Royster Guano Co. v. *Virginia,* 253 U. S. 412, 415 (1920). The Due Process Clause of the Fifth Amendment to the Constitution imposes on the federal government the same standard that is required of state legislation by the Equal Protection Clause of the Fourteenth Amendment. *Schweiker* v. *Wilson,* 450 U. S. 221, 228 (1981), and the Commerce power is subject to the due process requirement of the Fifth Amendment. *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, 589 (1935). Because of the invalidity of the classification based only on ownership, the section would fail under the Commerce Clause.

C. The Property Clause

Because 30 U.S.C. 1272(e)(2) is a rule ". . . affecting the property of the United States . . ." the

Property Clause, U. S. Const. Art. IV, Section 3, cl. 2, applies and its requirements must be met. The sole power of congress to enact legislation that controls or affects lands owned by the United States as such comes entirely from the Property Clause and not at all from the Commerce Clause. *FPC* v. *Tuscacora Indian Nation,* 362 U. S. 99, 113-115 (1960); *FPC* v. *Oregon,* 349 U. S. 435 (1955).

The question then becomes whether the privately owned mineral estate is property which can be regulated in any way pursuant to the authority of the Property Clause.

Under the Property Clause, Congress does have great power "without limitations" to make rules for the use, occupancy and protection of land owned by the United States. *U. S.* v. *San Francisco,* 310 U. S. 16, 29 (1940); *Utah Power & Light Co.* v. *U. S.,* 243 U. S. 389, 405 (1917); *see Kleppe* v. *New Mexico,* 426 U. S. 529, 539 (1976).

It is just as clear, however, that the power under the Property Clause to regulate or control the use of property not owned is limited absolutely, "solely," to the extent necessary to protect land which is owned by the United States. *Camfield* v. *U. S.,* 167 U. S. 518, 525-526 (1897); *see also U. S.* v. *Alford,* 274 U. S. 264, 266 (1927). In *Kleppe* v. *New Mexico, supra,* at 539, which involves only public, but no private property, that principle is recognized and reiterated.

But here the exercise of the mineral estate does not imperil the surface estate owned by the United States

in any way for the lawful exercise of the mineral estate does not cause any injury to the surface estate. *E.g., Transwestern Pipeline Co.* v. *Kerr-McGee Corp.,* 492 F. 2d 878 (10th Cir. 1974).

Under this statute, only the mineral estate would be affected or regulated. The surface estate of the United States cannot be said to be regulated by 30 U.S.C. 1272(e)(2) because there is no act or occurrence that might arise in the exercise of the surface estate which is subject to the Act. Conversely, every act and occurrence which would be regulated by Section 1272(e)(2) is a lawful incident of a mineral estate. While it is recognized that the Property Clause might be invoked to regulate private property for the protection of public property owned by the United States, no such rationale is available here, unless there is a lingering insistence at odds with the law of property that the federal property—land owned by the United States—is the rocks and trees and layers of dirt upon which one can stand. Those rocks and trees and layers of dirt where one stands, however, is property only "in the vulgar and untechnical sense". *U. S.* v. *General Motors Corp.,* 323 U. S. 373, 377 (1945).

What the United States owns is a bundle of rights, none of which is a right to hold or possess the property free from legitimate mining operations or even free from those legitimate mining operations to which it might object.

This is not to say, of course, that 30 U.S.C. 1272 (e)(2) has no validity or no proper application at all.

That section provides for the management and regulation of coal which the United States itself has the right to extract or produce and from which it could, through leasing, receive a return. *See Kinney-Coastal Oil Co.* v. *Kieffer,* 277 U. S. 488, 503 (1928). It is only when that section would be applied to a privately owned mineral estate that its application would be invalid. See *Boddie* v. *Connecticut,* 401 U. S. 371, 380 (1971); *Watson* v. *Buck,* 313 U. S. 387, 401 (1941).

Gabriel seeks to acquire nothing new here. It seeks only to protect and enjoy that which it already owns. See *Kinney-Coastal Oil Co.* v. *Kieffer,* 277 U. S. 488, 505 (1928). Gabried does not seek to be unregulated. It seeks only to be regulated in the same way as all other owners and operators of privately owned mineral estates.

That is what it is entitled to. Whatever the authority and powers of the United States might be, the United States has no property interest in the tract involved here upon which would invoke his power under the Property Clause.

Because treatment of the land involved here as "federal lands" would redefine "property" itself, a writ of certiorari should be granted.

Question II

Whether a Tract Referred to in Question I Above But Which Is Totally Outside of the National Forest Boundary Established by Presidential Proclamation Is "Within the Boundaries of Any National Forest" as That Phrase Is Used in 30 U.S.C. 1272(e)(2).

If the "federal land" provisions discussed above were held to be inapplicable to the petitioner's mineral estate, there would be no further question here. If, however, that private mineral estate were subject to those "federal land" provisions, there would be a second part of this controversy also presents a question of first impression of national importance. The second part would concern the meaning and application of the word "boundaries" as it is used in relation to federal land in 30 U.S.C. 1272(e)(2).

The statute, 30 U.S.C. 1272(e)(2), requires the existence of two separate conditions before it may be invoked. The first condition that must exist is that the land involved be "federal lands" as noted above, and the second condition that must exist is that the land involved be "within the boundaries of any national

The tract involved is not within the "boundaries" of any national forest, but outside a national forest in an area the United States Forest Service refers to administratively as the "Redbird Purchase Unit."[5] The Court of Appeals in holding that the tract involved

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[5]The term "Purchase Unit" has no significance except to locate the property involved. Gabriel does not rely on the fact that the area involved might be referred to as a "purchase unit", nor does it rely on any use of the term "purchase unit" that the Secretary or any other officer of the government might have made.

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here is within the boundaries of a national forest construes the term "boundary" to refer not to the exterior limit or any line or parcel or tract or location of land. The Court of Appeals construes the term "boundary" without reference to any prior use of the word. The opinion of the Court of Appeals is that because the government's interest in the tract was purchased under the authority of the Weeks Act, it is by virtue of that within the boundaries of any national forest. (App. A, *infra,* 6a-7a.)

In giving that new meaning to the word "boundaries" the Court of Appeals disregards not only the ordinary use of the word, but also the prior legislative use of the word and the law relating to that prior legislative use.

The importance of that construction of the word "boundaries" and the situation that the decision of the Court of Appeals creates is that there will either be an uneven treatment of land such as this in the various parts of the country, or that there will be an instability in any land or activity related in any way to the boundary of a National forest. Only in the context of the question as it arises here could a uniform definition of such "boundaries" be required throughout the country.

The term "boundaries" or "limits" of a national forest has a fixed and existing meaning in prior acts of

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Gabriel relies solely on the fact that the tract on which it proposes to open its mining operation is not situated within the proclaimed or proclamation boundary of the Daniel Boone or any other national forest.

Congress which is not considered in the opinion of the Court of Appeals. At 16 U.S.C. 471 and at 16 U.S.C. 473 pertaining to the establishment and modification of national forests, Congress required that the "boundaries" or "limits" of a national forest be established, changed or revoked only by presidential proclamation.

In 1911, Congress enacted the Weeks Act allowing national forests to be established on land acquired by purchase as well as on land withdrawn from the public domain. By reference, the Weeks Act at 16 U.S.C. 521, places all of the property acquired pursuant to its authority under the provisions of 16 U.S.C. 471[6] and 473.

When Congress adopted the phrase "within the boundaries of any national forest," it did so within the context of its own prior use of that word of which it was, presumptively or otherwise, aware. *Erlenbaugh* v. *U. S.*, 409 U. S. 239 (1972); *cf. Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535 (1954). The Congress, like individual citizens, is presumed to know the law

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[6]It is noted that 16 U.S.C. 471 referred to in 16 U.S.C. 521 was repealed by the Federal Land Policy and Management Act of 1976, 90 Stat. 2792; 16 U.S.C. 473, however, has not been repealed. The effect of the 1976 repeal of 16 U.S.C. 471 is simply to withdraw the President's authority to establish any new national forests. The repeal has no bearing on the status of forests already established under Section 471, nor on the status of their boundaries established under that Section.

After the repeal of Section 471, national forests already established continued in their existing status as national forests and the President retained his authority to change the boundary lines already established in the manner provided in Section 473.

when it acts. *Cannon* v. *University of Chicago,* 441 U. S. 667, 697-98 (1979). When Congress adopts a new act, it is understood to be fitted into existing law. *U. S.* v. *Jefferson Elec. Co.,* 291 U. S. 386, 396 (1934).

In addition to the rule referred to above that the Congress is presumed to know and intend to follow its prior use of a term when it uses a similar term in subsequent legislation, the statutes here, 30 U.S.C. 1272(e)(2) and 16 U.S.C. 471 and 473, should be construed in *pari materia.* The statutes all refer to the same thing —"boundaries" or "limits" of a national forest—with no apparent intention to give that term two different meanings within those references, the statutes must be construed in *pari materia. Hunter* v. *Ericson,* 393 U. S. 385, 388 (1969); *U. S.* v. *Stewart,* 311 U. S. 60, 69 (1940); *U. S.* v. *Freeman,* 44 U. S. 556, 564 (1845).

There is a boundary of a national forest near the tract involved here, but the tract is outside and not inside that established boundary. The boundary of the Daniel Boone National Forest was established in accordance with the statutes authorizing the creation of that forest by presidential proclamation in 1937[7] and there has been no change in that boundary since that time that would include the tract involved here.[8] The Court of Appeals treats the phrase "within the boundaries of any national forest" as meaning any land purchased under the Weeks Act, but that is not what

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[7]Presidential Proclamations. 2 Fed. Reg. 361 (Feb. 26, 1937) and 31 Fed. Reg. 3715 (Apr. 15, 1966).

the statute says. The statute does not attach its application to any character of land. The statute does not say "Federal lands which are wooded lands or forest lands," nor "lands managed by the forest service," nor does it say "Federal lands which were acquired under the authority of the Weeks Act." The construction which the Court of Appeals gives the phrase improperly renders the word "boundary" totally inoperative and ineffective surplusage. *Weinberger* v. *Hynson, Wescott & Dunning, Inc.*, 412 U. S. 609, 634 (1973); *see also In Re Permanent Surface Mining Regulation Litigation*, 627 F. 2d 1346, 1362 (D.C. Cir. 1980).

The authority under which the government made its purchase is just not apposite to the question of how

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[8]On June 12, 1979, the Secretary of Agriculture citing the provisions of the Weeks Act, issued a notice respecting the "boundary" of the Daniel Boone National Forest, 44 Fed. Reg. 33718 (June 12, 1979). The notice refers repeatedly to land "lying outside the existing National Forest boundary." The notice does not purport, however, to make any change in that part of the existing boundary situated in Owsley County where the tract of land involved here is situated.

Whatever the significance and status of that notice, the government recognized "the boundary of a national forest" as a definite, precise, existing thing. The notice recognizes an existing boundary and purports to make certain specified changes in it. The Gabriel leasehold property involved in this matter would not be included in the exterior lines of either the "existing boundary" or within the boundary with the purported changes referred to in that notice.

The notice of June 12, 1979, whatever its significance, thus has no bearing on this controversy except that in it the government recognizes and employs the same meaning of "boundary of a national forest" that Gabriel is asserting here.

the Congress chose, for whatever reasons, to treat its different categories of property purchased and managed under that authority.

The statute says what Congress intended, and the statute says "Federal lands" which are "within the *boundaries* of any national forest [emphasis added]." The phrase "within the boundaries of any national forest" is a fixed, precisely described, line.[9] The phrase "within the boundaries of any national forest" means the external lines of any such boundary described and proclaimed in that way.[10]

If the words Congress used in enacting 30 U.S.C. 1272(e)(2), the use and meaning which it had given those terms in prior legislation and which it presumptively knew and intended here, and indeed if those words are to have any meaning at all, and if there is to be stability throughout the country in private mineral estates in this situation and their relationship to the statute a writ of certiorari should be granted and the question considered.

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[9]Presidential Proclamation. 2 Fed. Reg. 361 (Feb. 26, 1937).

[10]*Cf.* "In view of [the] requirements of federal law, it is clear that the best evidence of the existence of a national forest, or federal forest reserve, is the President's public proclamation establishing it. . . ." *Bd. of Com'rs of Marshall Co.* v. *Snellgrove*, 428 P. 2d 272, 275 (Okla. 1967).

CONCLUSION

When the proprietary and sovereign powers of the United States are examined separately, neither is sufficient to support the construction of 30 U.S.C. 1272 (e)(2) that the Court of Appeals has given it, nor can they be combined to give sufficient authority for it.

In upholding the challenged application of that statute, the Court of Appeals has departed from the established meaning of property and its boundaries—of all property of whatever kind and whether publicly or privately owned—so that to preserve the meaning, uniformity and stability of property, a writ of certiorari should be granted.

Respectfully submitted,

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